



6712-01

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WT Docket No. 05-211; FCC 12-12]

Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Federal Communications Commission removes two modifications to its competitive bidding rules pursuant to a mandate by the U.S. Court of Appeals for the Third Circuit.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]

FOR FURTHER INFORMATION CONTACT: Wireless Telecommunications Bureau, Auctions and Spectrum Access Division: Audrey Bashkin at (202) 418-0660.

SUPPLEMENTARY INFORMATION: This is a summary of an Order released on February 1, 2012. The complete text of the Order, including an attachment and related Commission documents, is available for public inspection and copying from 8:00 a.m. to 4:30 p.m. Eastern Time (ET) Monday through Thursday or from 8:00 a.m. to 11:30 a.m. ET on Fridays in the FCC Reference Information Center, 445 12th Street SW, Room CY-A257, Washington, DC 20554. The Order and related Commission documents also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), 445 12th Street SW, Room CY-B402, Washington, DC 20554, telephone 202-488-5300, fax 202-488-5563, website <http://www.BCPIWEB.com>. When ordering documents from BCPI, please provide the appropriate FCC document number, for example, FCC 12-12. The Order and related documents also are available on the Internet at the Commission's website: <http://wireless.fcc.gov/auctions>, or

by using the search function for WT Docket No. 05-211 on the Commission's Electronic Comment Filing System (ECFS) web page at <http://www.fcc.gov/cgb/ecfs/>.

I. Background

1. In Council Tree Communications, Inc. v. FCC, 619 F.3d 235 (3d Cir. 2010), cert. denied, 131 S. Ct. 1784 (2011), the U.S. Court of Appeals for the Third Circuit vacated two modifications the Federal Communications Commission (Commission) had made in 2006 to its competitive bidding rules for designated entities on the ground that the Commission had failed to provide the public an adequate opportunity for notice and comment. The Commission removes the two modifications in accordance with the Third Circuit's mandate.

2. The Third Circuit held that the Commission's impermissible material relationship rule in 47 CFR 1.2110(b)(3)(iv)(A) and its extension of the unjust enrichment period from five years to ten years in 47 CFR 1.2111(d)(2) had been adopted without the notice and opportunity for comment required by the Administrative Procedure Act. The Court thus vacated the impermissible material relationship rule and ordered reinstatement of the Commission's previous five year unjust enrichment payment schedule. The Court also denied Council Tree's petition for review with respect to the attributable-material-relationship rule articulated in 47 CFR 1.2110(b)(1) and (b)(3)(iv)(B).

II. Discussion

3. The Order conforms Part 1 of the Commission's rules to the Court's mandate by amending 47 CFR 1.2110 to remove paragraph (b)(3)(iv)(A) and 47 CFR 1.2111 by removing paragraph (d)(2)(i) as no longer applicable and reinstating the previous version of the payment schedule in 47 CFR 1.2111(d)(2). The Order also conforms other Part 1 rules, as necessary, to remove several references to impermissible material relationships.

4. The Commission finds that notice and comment are unnecessary for these rule amendments under 5 U.S.C. Section 553(b), because this is a ministerial order issued at the direction of the United States Court of Appeals for the Third Circuit.

III. Congressional Review Act

5. The Commission will send a copy of the Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 1

Administrative practice and procedures, Auctions, Licensing, Telecommunications.

FEDERAL COMMUNICATIONS COMMISSION

Bulah P. Wheeler,

Deputy Manager.

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR Part 1 as follows:

PART 1 – PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: 15 U.S.C. 79 et seq.; 47 U.S.C. 151, 154(j), 160, 201, 225, 303, and 309.

2. Section 1.2110 is amended by removing paragraph (b)(3)(iv)(A) and redesignating paragraphs (b)(3)(iv)(B) and (C) as paragraphs (b)(3)(iv)(A) and (B) and by revising newly redesignated paragraph (b)(3)(iv)(B) and revising paragraph (j) to read as follows:

§ 1.2110 Designated entities.

* * * * *

(b) * * *

(3) * * *

(iv) * * *

(B) Grandfathering (1) Licensees. An attributable material relationship shall not disqualify a licensee for previously awarded benefits before April 25, 2006, based on spectrum lease or resale (including wholesale) arrangements entered into before April 25, 2006.

(2) Applicants. An attributable material relationship shall not disqualify an applicant seeking eligibility in an application for a license, authorization, assignment, or transfer of control or for partitioning or disaggregation filed before April 25, 2006, based on spectrum lease or resale (including wholesale) arrangements entered into before April 25, 2006. Any applicant seeking eligibility in an application for a license, authorization, assignment, or transfer of control or for partitioning or disaggregation filed after April 25, 2006, or in an application to participate in an auction in which bidding begins on or after June 5, 2006, need not attribute the material relationship(s) of those entities that are its affiliates based solely on paragraph (c)(5)(i)(C) of this

section if those affiliates entered into such material relationship(s) before April 25, 2006, and are subject to a contractual prohibition preventing them from contributing to the applicant's total financing.

* * * * *

(j) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long form applications all agreements that affect designated entity status such as partnership agreements, shareholder agreements, management agreements, spectrum leasing arrangements, spectrum resale (including wholesale) arrangements, and all other agreements including oral agreements, establishing as applicable, de facto or de jure control of the entity or the presence or absence of attributable material relationships. Designated entities also must provide the date(s) on which they entered into of the agreements listed. In addition, designated entities must file with their long-form applications a copy of each such agreement. In order to enable the Commission to audit designated entity eligibility on an ongoing basis, designated entities that are awarded eligibility must, for the term of the license, maintain at their facilities or with their designated agents the lists, summaries, dates and copies of agreements required to be identified and provided to the Commission pursuant to this paragraph and to §1.2114.

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3. Section 1.2111 is revised by removing paragraph (d)(2)(i) and redesignating paragraphs (d)(2)(ii) and (iii) as paragraphs (d)(2)(i) and (ii) and by revising them to read as follows:

§ 1.2111 Assignment or transfer of control: unjust enrichment.

* * * * *

(d) * * *

(2) Payment schedule. (i) The amount of payments made pursuant to paragraph (d)(1) of this section will be reduced over time as follows:

(A) A transfer in the first two years of the license term will result in a forfeiture of 100 percent of

the value of the bidding credit (or in the case of very small businesses transferring to small businesses, 100 percent of the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible);

(B) A transfer in year 3 of the license term will result in a forfeiture of 75 percent of the value of the bidding credit;

(C) A transfer in year 4 of the license term will result in a forfeiture of 50 percent of the value of the bidding credit;

(D) A transfer in year 5 of the license term will result in a forfeiture of 25 percent of the value of the bidding credit; and

(E) For a transfer in year 6 or thereafter, there will be no payment.

(ii) These payments will have to be paid to the United States Treasury as a condition of approval of the assignment, transfer, ownership change or reportable eligibility event (see § 1.2114).

* * * * *

4. Section 1.2112 is amended by revising paragraphs (b)(1)(iii) and (b)(2)(iii) to read as follows:

§ 1.2112 Ownership disclosure requirements for applications.

* * * * *

(b) * * *

(1) * * *

(iii) List and summarize all agreements or instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business under the applicable designated entity provisions, including the establishment of de facto or de jure control or the presence or absence of attributable material relationships.

Such agreements and instruments include articles of incorporation and by-laws, partnership agreements, shareholder agreements, voting or other trust agreements, management agreements, franchise agreements, spectrum leasing arrangements, spectrum resale (including wholesale) arrangements, and any other relevant agreements (including letters of intent), oral or written;

* * * * *

(2) * * *

(iii) List and summarize all agreements or instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business under the applicable designated entity provisions, including the establishment of de facto or de jure control or the presence or absence of attributable material relationships.

Such agreements and instruments include articles of incorporation and by-laws, partnership agreements, shareholder agreements, voting or other trust agreements, management agreements, franchise agreements, spectrum leasing arrangements, spectrum resale (including wholesale) arrangements, and any other relevant agreements (including letters of intent), oral or written;

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